

Source codes land in escrow lockers

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BANGALORE: Once parting with the source code – the blue print of a software programme – was considered a sacrilege. But a new trend is emerging, that of keeping the source code in an escrow account, for release to the buyer under certain circumstances. And this trend has recently hit Indian shores.

Customers in India are gradually recognising the importance of an escrow clause in their agreements with software suppliers, especially when the software has been licensed from a start-up or small company.

Similarly, Indian software suppliers are now comfortable with this concept and readily place the code with an escrow agent, at least when large international customers demand it. The source code is released by the escrow agent to the concerned customer if certain events occur, such as bankruptcy, change in control of the supplier company, or a material breach of contract regarding the maintenance services that were agreed upon.

Escrow agreements, however, require careful drafting. V Umakanth, partner, Amarchand & Mangaldas & Suresh A Shroff & Co, states, “The buyer should be able to obtain an automatic release of the code upon the occurrence of the event specified. Similarly, the buyer should be able to utilise the source code without relying on the employees of the software supplier. Thus, it is crucial that additional operating manuals and documents are also deposited with the escrow agent.”

Vaibhav Parikh, head, technology practise, **Nishith Desai Associates**, explains the procedure: “The escrow agent is a technically equipped professional organisation. The software supplier selects the agent and offers the facility of an escrow to its customers. If more than one customer ask for an escrow clause in the agreement, the software supplier has to give its source code to only one escrow agent. The agreement is tripartite between the agent, the software supplier and the customer.”

Generally escrow agreements are entered into only with important customers. Deepak Ghaisas, CFO and chief executive, India operations, i-flex, explains: “Big customers that have their own technology department alone can utilise the source code, as and when made available by the escrow agent.”

At i-flex, depositing of the source code with an escrow agent is also a safety mechanism. Mr Ghaisas points out, “Initially, i-flex began by depositing the source code with a renowned escrow agent as a part of its disaster recovery strategy. This practise continues and the source code is upgraded periodically. Gradually, this practise was extended to cover large-sized banks that requested for the source code to be placed with an escrow agent.”

Due caution is exercised when entering into such a tripartite agreement, especially the conditions regarding release of the source code by the escrow agent. Subash Menon, president and CEO, Subex Systems, says, “The customer has to establish that they are unable to obtain support from Subex, causes could range from bankruptcy or discontinuation of that software product.” Subex Systems has entered into such agreements only for its customers in North America.

Similarly Sanjay Deshmukh, business development director, Business Objects, states: “The customer who gets the source code, if the stipulated events occur, has only limited rights and can use the same only for support related activities. The customer cannot make commercial use of the same by reproducing it.”

Till date, there are no escrow agencies in India. Data Security International, InnovaSafe, EscrowTech International, DSI Escrow Technology Services, based in the UK and US, are commonly used. In most cases, it is the customer who bears the cost of the escrow agent. India has still some way to go before it can be seen as a hub for escrow agents. Till then, it is the players in the US and UK who are laughing all the way to the bank.